Feb 2 2000

SUPREME COURT, U.S.
FILED
FEB 2 2000
OFFICE OF THE CLERK

No. 8, Original

In the Supreme Court of the United States

STATE OF ARIZONA, COMPLAINANT

v.

STATE OF CALIFORNIA, ET AL.

ON EXCEPTIONS TO THE REPORT OF THE SPECIAL MASTER

REPLY BRIEF FOR THE UNITED STATES IN RESPONSE TO THE EXCEPTION OF THE STATE PARTIES

SETH P. WAXMAN
Solicitor General
Counsel of Record
LOIS J. SCHIFFER
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
JEFFREY P. MINEAR
Assistant to the Solicitor General
F. PATRICK BARRY
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

28p

QUESTION PRESENTED

Whether this Court's decisions in *Arizona* v. *California*, 373 U.S. 546 (1963) (*Arizona I*), and *Arizona* v. *California*, 460 U.S. 605 (1983) (*Arizona II*), preclude the United States and the Quechan Tribe from asserting water rights claims in this proceeding.

TABLE OF CONTENTS

	Page
Statement	1
Summary of argument	3
Argument:	
This Court's decisions in *Arizona* I and *Arizona* II do not preclude the United States and the Quechan Tribe from asserting water rights claims for boundary lands in this proceeding	4
A. The origins and history of the boundary lands litigation demonstrate that this Court intended Master McGarr to decide the boundary lands claims on the merits	5
B. The Court's preclusion rationale concerning "omitted lands" in *Arizona* II does not apply to the boundary lands claims for the Fort Yuma Reservation	13
C. The preclusion defense has in any event been waived in, and foreclosed by, prior proceedings in this case	18
D. The Master's ultimate recommendation that this Court's decisions in *Arizona* I and *Airzona* II do not preclude the boundary lands claims is correct	21
E. The boundary lands claims for the Fort Yuma Reservation should be remanded for further proceedings	22
Conclusion	23

TABLE OF AUTHORITIES

Cases:	Page
Allen v. *McCurry*, 449 U.S. 90 (1980)	15
Arizona v. *California*:	
373 U.S. 546 (1963)	2, 3, 5, 6, 15, 16, 17
376 U.S. 340 (1964)	3, 6, 7, 10
439 U.S. 419 (1979)	3, 9, 17
460 U.S. 605 (1983)	*passim*
466 U.S. 144 (1984)	12, 16
514 U.S. 1081 (1995)	2
Blonder-Tongue Labs., Inc. v. *University of Ill. Found.*, 402 U.S. 313 (1971)	18
Cromwell v. *County of Sac*, 94 U.S. 351 (1876)	15
Huffman v. *Pursue, Ltd.*, 420 U.S. 592 (1975)	18
Lawlor v. *National Screen Serv. Corp.*, 349 U.S. 322 (1955)	15
Metropolitan Water Dist. of S. Cal. v. *United States*, 830 F.2d 139 (9th Cir. 1987), aff'd, 490 U.S. 920 (1989)	13
Montana v. *United States*, 440 U.S. 147 (1979)	14
Nebraska v. *Wyoming*, 507 U.S. 584 (1993)	18, 21
Plaut v. *Spendthrift Farm, Inc.*, 514 U.S. 211 (1995)	19
Quechan Tribe of the Ft. Yuma Reservation v. *United States*, Indian Claims Comm'n Docket No. 320 (Aug. 11, 1983)	2
Richards v. *Jefferson County*, 517 U.S. 793 (1996)	15
Rivet v. *Regions Bank*, 522 U.S. 470 (1998)	15, 18
Rules:	
Sup. Ct. R. 17	18
Fed. R. Civ. P.:	
Rule 8(c)	18
Rule 12(b)	18

Miscellaneous:	Page
Restatement (Second) Judgments (1982)	15, 16
Charles A. Wright et al., *Federal Practice and Procedure* (1981)	15, 16

In the Supreme Court of the United States

No. 8, ORIGINAL

STATE OF ARIZONA, COMPLAINANT

v.

STATE OF CALIFORNIA, ET AL.

ON EXCEPTIONS TO THE REPORT OF THE SPECIAL MASTER

REPLY BRIEF FOR THE UNITED STATES IN RESPONSE TO THE EXCEPTION OF THE STATE PARTIES

STATEMENT

This case is before the Court on exceptions to the Report of Special Master McGarr. The Master has recommended approval of the parties' proposed settlement of the water rights claims of the Fort Mojave and Colorado River Indian Reservations, but has rejected the water rights claims for the Fort Yuma Reservation. See McGarr Rep. 12-14. We have summarized the background of this case and the Master's rulings in the United States' Brief in Support of its Exception to Master McGarr's Report. See U.S. Except. Br. 1-12.

The only contested issue before the Court is whether the water rights claims relating to disputed "boundary lands" of the Fort Yuma Reservation are precluded by prior litigation. The State of Arizona, the State of California, the Coachella Valley Water District, and the Metropolitan Water District of Southern California (collectively the State Parties) argued before the Master that the claims for the disputed portions of the Fort

Yuma Reservation are precluded by: (1) this Court's prior decisions in *Arizona* v. *California*, 373 U.S. 546 (1963) (*Arizona I*), and *Arizona* v. *California*, 460 U.S. 605 (1983) (*Arizona II*); and (2) a consent judgment entered by the United States Claims Court in *Quechan Tribe of the Fort Yuma Reservation* v. *United States*, Indian Claims Comm'n Docket No. 320 (Aug. 11, 1983) (*reprinted at* U.S. Except. Br. App. 66a-67a), which resolved a reservation boundary dispute between the United States and the Quechan Tribe. The Master rejected the State Parties' first argument, but accepted the second. McGarr Rep. 7-8; *id.* App. 2(A) at 1-10.

The State Parties have excepted to the Master's resolution of their first argument (State Parties Except. Br. 1), while the United States and the Quechan Tribe have excepted to his resolution of the second argument (U.S. Except. Br. I; Quechan Except. Br. i). This brief responds to the State Parties' Exception.[1]

---

[1] We note that an entity entitled the West Bank Homeowners Association has moved to file a brief amicus curiae objecting to the Master's recommendation that this Court approve the proposed settlement of water rights claims respecting the Colorado River Indian Reservation. The Association consists of a number of persons who lease property from the United States within the current boundaries of the Colorado River Indian Reservation and object to the United States' determination that those lands are part of the Reservation. This Court and Master McGarr have each denied the Association's request to intervene in this proceeding. See *Arizona* v. *California*, 514 U.S. 1081 (1995); Memorandum Opinion and Order No. 17 of Special Master McGarr (Mar. 29, 1995). As the Master noted, the Association and its members do "not own land in the disputed area and makes no claim to title or water rights," *id.* at 2, and their interests will "not be impeded or impaired by the disposition of this litigation," *id.* at 4. As a consequence, the Association's objections, which raise matters that belong in other fora, are not germane to the issues before this Court. See generally Objection of the State of California, the Metropolitan Water District of Southern California, the Coachella Valley Water District, and the Colorado River Indian Tribes to the Motion of the West Bank Homeowners Association for Leave to File Brief Amicus Curiae; see also Reply of the Colorado River Indian Tribes to the Proposed Brief Amicus Curiae of the West Bank Homeowners Association.

SUMMARY OF ARGUMENT

The State Parties are mistaken in their submission that this Court's decisions in *Arizona I* and *Arizona II* preclude the United States and the Quechan Tribe from asserting water rights claims in this proceeding. The Court ruled in *Arizona I* that the Special Master erred in adjudicating boundary disputes respecting the Fort Mojave and the Colorado River Indian Reservations. The Court concluded that the Tribes' water rights claims respecting the disputed boundary lands should instead be resolved at a later date, 373 U.S. at 601, and it entered a Decree that expressly directed that result, 376 U.S. 340, 345 (1964). The United States did not attempt to adjudicate the analogous boundary lands claims for the Fort Yuma Reservation in *Arizona I*, but the manifest implications of that decision, the nature of those claims, the Court's subsequent modifications of the Decree, 439 U.S. 419, 421 (1979), and the Court's statements in *Arizona II*, 460 U.S. at 634, all establish that the Fort Yuma claims were subject to the same rule and could not have been asserted at that time. The Court accordingly expected Master McGarr to decide those claims on their merits in the current proceedings.

Moreover, the State Parties' specific legal arguments respecting claim preclusion are flawed. Contrary to the State Parties' assertions, the Court's preclusion rationale concerning "omitted lands" in *Arizona II* does not

apply to the boundary lands for the Fort Yuma Reservation. The boundary lands claims, unlike the omitted lands claims, present legal issues that were not adjudicated in *Arizona I*. Furthermore, this Court's reasoning in *Arizona I* established that the boundary lands claims could not have been adjudicated in that proceeding. Under bedrock principles of res judicata, it would be inappropriate to preclude the United States and the Tribe from litigating those claims. The State Parties have waived their right to invoke a claim preclusion defense. But waiver aside, the defense is inapplicable here for the straightforward reason that the United States and the Quechan Tribe did not, and could not, assert their boundary lands claims in the prior proceedings.

ARGUMENT

THIS COURT'S DECISIONS IN *ARIZONA I* AND *ARIZONA II* DO NOT PRECLUDE THE UNITED STATES AND THE QUECHAN TRIBE FROM ASSERTING WATER RIGHTS CLAIMS FOR BOUNDARY LANDS IN THIS PROCEEDING

The State Parties contend that the Court's prior decisions in this ongoing original action preclude the United States and the Quechan Tribe from asserting water rights claims based on changes in the boundaries of the Fort Yuma Reservation that the United States recognized during the course of the litigation. To place the State Parties' argument in perspective, we begin by reviewing the history of the so-called boundary lands claims. We then address the State Parties' specific contentions.

A. The Origins And History Of The Boundary Lands Litigation Demonstrate That This Court Intended Master McGarr To Decide The Boundary Lands Claims On The Merits

Arizona commenced this original action in 1952 to obtain a judicial resolution of its entitlement to waters of the Colorado River Basin. See U.S. Except. Br. 2-3. In response, the United States asserted water rights for the reservation of the Quechan Tribe as well as for the reservations of four other Indian entities: the Chemehuevi, Cocopah, Fort Mojave, and Colorado River Indian Tribes. See *id.* at 3. When the first Special Master in this case, Simon Rifkind, evaluated the United States' Indian water rights claims, he concluded that he needed to resolve certain existing boundary disputes respecting the Fort Mojave and Colorado River Indian Reservations to determine the "practicably irrigable" acreage in each of those Reservations. See *id.* at 4; Rifkind Report 274-278, 283-287 (1960). This Court concluded, however, that the Master should not have reached those "boundary lands" issues. The Court stated that it was "unnecessary to resolve those disputes here" because, "[s]hould a dispute over title [to the boundary lands] arise because of some future refusal by the Secretary [of the Interior] to deliver water to either area, the dispute can be settled at that time." *Arizona I*, 373 U.S. at 601.

At the time that the proceedings in *Arizona I* were taking place, the United States was engaged in litigation with the Quechan Tribe, before the Indian Claims Commission, respecting the boundaries of the Tribe's Fort Yuma Indian Reservation. See U.S. Except. Br. 18-19. Although Master Rifkind had addressed the Fort Mojave and Colorado River Indian

Tribes' boundary disputes, he had no occasion whatsoever to resolve the Quechan Tribe's ongoing boundary dispute. The United States did not assert a water rights claim for the Quechan Tribe's boundary lands in the *Arizona I* proceedings because the Solicitor of the Department of the Interior had previously determined, in a 1936 opinion, that the Quechan Tribe did not own those lands. The United States had relied on the Solicitor's determination in the Indian Claims Commission proceeding. See *id.* at 17-18. The United States accordingly determined that it was not appropriate to assert a water rights claim in the proceedings before Master Rifkind for lands that the United States contended, in another forum, the Tribe did not own. The United States' conclusion that it should not assert a claim for the disputed boundary lands of the Fort Yuma Reservation in the face of the Indian Claims Commission proceeding proved to be consistent with this Court's decision in *Arizona I*. As we have explained, the Court held that the Master should not have resolved boundary lands disputes involving the Fort Mojave and Colorado River Indian Reservations. See 373 U.S. at 601. By the same reasoning, the Master could not have resolved the analogous boundary land disputes involving the Fort Yuma Reservation.

Following its decision in *Arizona I*, the Court entered its initial Decree, which contained three provisions of current interest. See *Arizona* v. *California*, 376 U.S. 340 (1964). First, the Decree recognized the prospect that future determinations of reservation boundaries could alter the water rights of the affected Tribes. Article II(D)(5) stated, with specific reference to the Fort Mojave and Colorado River Indian Reservations, that the quantities of water provided for those Reservations "shall be subject to appropriate adjust-

ment by agreement or decree of this Court in the event that the boundaries of the respective reservations are finally determined." *Id.* at 345. Second, Article VI provided that the parties should provide the Court with a list of the outstanding present perfected rights (including Indian water rights) in the mainstream waters and that, if the parties were unable to reach agreement, any party could apply to the Court for determination of present perfected rights. *Id.* at 351-352.[2] Third, Article IX provided that the Court would retain "jurisdiction of this suit for the purpose of any order, direction, or modification of the decree, or any supplementary decree, that may at any time be deemed proper in relation to the subject matter in controversy." *Id.* at 353.

The parties were unable to reach agreement on the present perfected rights and, in 1977, they returned to the Court and moved for a determination of those rights. See U.S. Except. Br. 5; *Arizona II*, 460 U.S. at 611-612; Tuttle Report 18-19.[3] During the following year, while those motions were pending, two significant events occurred. First, the five individual Indian Tribes, including the Quechan Tribe, moved to intervene in the suit on the ground that the United States was not adequately representing their interests. See *Arizona II*, 460 U.S. at 612; Tuttle Report 20-21. Second, the State Parties and the United States were able to reach agreement on the question of present perfected rights and, on May 30, 1978, they filed a joint

---

[2] The State Parties erroneously identify Article II(d)(5) as the Article providing for submission of lists of present perfected rights. See State Parties Except. Br. 10.

[3] As we explain below, the Court appointed Judge Elbert P. Tuttle to succeed Simon Rifkind as the Special Master in this case. His report, filed in 1982, describes those motions and the ensuring events.

motion for entry of a Supplemental Decree describing those rights. See *id.* at 18-19.

The State Parties and the United States initially opposed the Tribes' intervention, but the United States later dropped its opposition and, on December 22, 1978, moved for entry of a Supplemental Decree to grant additional water rights to the Indian Tribes. *Arizona II*, 460 U.S. at 612. Those proposed water rights encompassed both the disputed boundary lands for the Fort Yuma Reservation and other Reservations, as well as certain other lands, known as "omitted" lands, that were within the 1964 boundaries of the Reservations but for which the United States had not claimed water rights. See *ibid.*; Tuttle Report 22-24. The United States' change in position was motivated, in part, by a change in the Interior Department's views respecting the boundaries of the Fort Yuma Reservation. On December 20, 1978, the Secretary of the Interior had entered an order holding that the United States did, in fact, hold the disputed boundary lands in trust for the Quechan Tribe. See U.S. Except. Br. 20-24. The United States therefore revised its position in the *Arizona* v. *California* suit to protect the Quechan Tribe's entitlement to water rights in the ongoing litigation. See *id.* at 25; see also *Arizona II*, 460 U.S. at 632-633 (describing the boundary lands claims respecting the Fort Yuma Indian Reservation).

This Court responded to those developments by: (1) entering the 1979 Supplemental Decree; (2) denying the motions of the Fort Mojave, Chemehuevi, and Quechan Tribes to intervene insofar as they sought to oppose entry of the Supplemental Decree; and (3) referring other matters raised by the United States and the five Tribes to a second Special Master, Senior Judge Elbert P. Tuttle, for his recommendations. See *Arizona II*, 460 U.S. at 612. Significantly, the parties agreed to revise Article II(D) of the 1964 Decree to enlarge the number of Tribes that could assert boundary lands claims. See *Arizona* v. *California*, 439 U.S. 419, 421 (1979). As a result of the 1979 Supplemental Decree, Article II(D)(5) Decree stated:

> The quantities [of water] fixed in [the 1964 Decree sections setting forth the water rights of each of the five Tribes] shall continue to be subject to appropriate adjustment by agreement or decree of this Court in the event that the boundaries of the respective reservations are finally determined.

Ibid. (as quoted, with bracketed passages supplied by this Court, in *Arizona II*, 460 U.S. at 634). In the words of this Court, the 1979 Supplemental Decree "not only expressly left unaffected Article II(D)(5) providing for possible adjustments with respect to the Colorado River and Fort Mojave Reservations, but it also left open the issues about the boundaries of the other Reservations." *Ibid.* The Court referred the boundary lands issues, together with the omitted lands issues, to Master Tuttle. *Ibid.*

Master Tuttle prepared a Final Report explaining his recommendations. See *Arizona II*, 460 U.S. at 612-613. He concluded that the Tribes should be allowed to intervene, see Tuttle Report 22-23, and he then addressed the omitted lands issues, see *id.* at 29-55, and the boundary lands issues, see *id.* at 55-76. In the case of the omitted lands claims, the State Parties argued that the Tribes were precluded by principles of res judicata from claiming additional water rights because the United States should have made claims for those lands in the proceedings before Master Rifkind. See *id.* at 29-30. Master Tuttle rejected that argument and

concluded that Article IX of the Decree, which preserved the Court's power to modify the Decree, 376 U.S. at 353, permitted the United States and the Tribes to seek the additional water rights. See Tuttle Report 32. In the case of the boundary lands claims, the State Parties did *not* raise a preclusion defense. To the contrary, as Master Tuttle explained:

> All the parties agree that the Court should now determine any additional present perfected rights. Although the 1964 Decree acknowledged and expressly provided for boundary disputes only with respect to the Fort Mojave and Colorado River Indian Reservations, the additional proviso of the 1979 Decree, issued after the Court was apprised of boundary disputes concerning the other Reservations, indicates that the amounts determined for all five Reservations "shall continue" to be subject to adjustment. Thus, adjustments for boundary determinations affecting any of the Reservations were explicitly provided for in the 1979 Decree and impliedly contemplated in the 1964 Decree "in the event that the boundaries of the respective reservations are finally determined." [footnote omitted]
>
> The State Parties concede that when the boundary lines have been finally determined, the Court should allot the water rights in proportion to the practicably irrigable acreage of additional boundary lands, and urge that the Court should now consider such an allotment [footnote omitted]. They contend, however, that the boundaries have not been finally determined and that I should make a de novo determination of the boundaries for recommendation to the Court. The issue, then, is whether the Secretarial orders, court judgments, and Act of Congress re-

> lied on by the Tribes and the United States are the sort of final determinations contemplated by the Court's Decrees.

Tuttle Report 56-57.[4] Master Tuttle determined that he should not make de novo boundary findings and instead concluded that "the determinations that have been made with respect to the stated boundary changes"—including the Secretarial order respecting the Fort Yuma Reservation of the Quechan Tribe—"may be accepted as final for the purpose of considering additional allocations of water rights to the Reservations." *Id.* at 63.

This Court's *Arizona II* decision rejected Master Tuttle's determinations that preclusion principles do not apply to the omitted lands, 460 U.S. at 615-628, and that Secretarial orders respecting the Fort Yuma, Fort Mojave, and Colorado River Indian Reservations constituted "final" determinations of the Reservation boundaries, *id.* at 628-641. But the *Arizona II* decision in no way suggested that the Tribes' boundary lands claims were precluded by prior litigation. To the contrary, the Court recognized that the boundary disputes affecting the Fort Yuma Reservation shared the same undecided status as the boundary disputes affect-

---

[4] Master Tuttle also noted that Article IX, which allowed the Court to modify the existing Decree, "even most narrowly construed, would recognize the propriety of entertaining claims as to the Chemehuevi, Fort Yuma, and Cocopah Reservations paralleling those that can be raised as to the Fort Mojave and Colorado River Reservations under Article II(D)(5)." Tuttle Report 56-57 n.73.

ing the Fort Mojave and Colorado River Indian Reservations:

> Our supplemental decree of 1979 did not * * * resolve these [boundary] disputes. Rather, it not only expressly left unaffected Article II(D)(5) providing for possible adjustments with respect to the Colorado River and Fort Mojave Reservations, but it also left open the issues about the boundaries of the other reservations.

Id. at 634. In addition, the Court indicated its understanding that the boundary lands issues had not been—but would be—determined on the merits:

> It is clear enough to us, and it should have been clear enough to others, that our 1963 opinion and 1964 decree anticipated that, if at all possible, the boundary disputes would be settled in other forums.

Id at 638. Plainly, if the Court believed that its decisions in *Arizona I* and *Arizona II* had precluded any of the Tribe's boundary lands disputes, it would not have directed that they "would be settled" elsewhere. Instead, the Court directed that the parties should attempt to resolve the boundary lands issues through district court litigation. *Ibid.* Thereafter, the Court reiterated, through its 1984 Supplemental Decree, that the water rights for all five Indian Reservations "shall be subject to appropriate adjustments by agreement or decree of this Court in the event that the boundaries of the respective reservations are finally determined." *Arizona* v. *California*, 466 U.S. 144, 145 (1984).

The district court ultimately proved to be an inappropriate forum for resolving the boundary lands claims, which led to a renewal of proceedings in this Court and the appointment of Master McGarr to resolve those

claims. See *Metropolitan Water Dist. of S. Cal.* v. *United States*, 830 F.2d 139 (9th Cir. 1987), aff'd by an equally divided Court, 490 U.S. 920 (1989); McGarr Report 4-6. In light of the foregoing history, there can be little doubt that the Court did not view its decisions in *Arizona I* and *Arizona II* as precluding the claims for the disputed boundary lands of the Fort Yuma Reservation. To the contrary, the Court's decision in *Arizona II* and the 1979 and 1984 Supplemental Decrees made clear that Master McGarr was to determine all of the Indian water rights claims arising from boundary lands disputes, including those of the Fort Yuma Reservation, on their merits. Against that background, we next address the State Parties' specific arguments.

B. The Court's Preclusion Rationale Concerning "Omitted Lands" In *Arizona II* Does Not Apply To The Boundary Lands Claims For The Fort Yuma Reservation

The State Parties contend that the rationale that this Court expressed in *Arizona II* for precluding the United States and the Indian Tribes from asserting omitted lands claims should also preclude the United States and the Quechan Tribe from pursuing boundary lands claims for the Fort Yuma Reservation. State Parties Except. Br. 19-20. The State Parties overlook at least three fundamental distinctions between the omitted lands claims at issue in *Arizona II* and the boundary lands claims at issue here.

First, the Court concluded in *Arizona II* that the omitted lands claims should be precluded primarily because the Court should "not reopen an adjudication in an original action to reconsider whether initial factual determinations were correctly made." 460 U.S. at 623-624, 625. The Court noted that "while the technical

rules of preclusion are not strictly applicable" to sequential proceedings in a single case within the Court's original jurisdiction, the res judicata principles upon which those rules are founded "should inform our decision." *Id.* at 619. The Court gave special weight to the "fundamental precept of common-law adjudication" that "an issue once determined by a competent court is conclusive." *Ibid.* (citing *Montana* v. *United States*, 440 U.S. 147, 153 (1979)). The Court's decision in *Arizona I* had comprehensively addressed and resolved the factual questions respecting what lands within the 1964 reservation boundaries were "practicably irrigable," and the Court was understandably reluctant to recalculate the irrigable acreage. The Court recognized that allowing relitigation of those factual issues could "open what may become a Pandora's Box, upsetting the certainty of all aspects of the decree." *Id.* at 625.

The current dispute over the boundaries of the Fort Yuma Reservation rests on a different footing. The boundary lands claims do not call for the redetermination of factual issues that were fully and fairly litigated in the *Arizona I* proceedings. Rather, they turn on the validity of a 1978 Secretarial order holding, based on an opinion of the Solicitor of the Interior, that certain federal lands are, and have always been, part of the Fort Yuma Indian Reservation. See U.S. Except. Br. 23-24. The validity of that order presents a question of law—the meaning and effect of an 1893 Agreement between the United States and the Quechan Tribe (see U.S. Except. Br. App. 1a-10a)—that was not briefed or decided in the prior proceedings.

Second, the boundary lands claims for the Fort Yuma Reservation *could not have been decided* in the *Arizona I* proceedings. This Court expressly ruled in *Arizona I* that Master Rifkind erred in deciding the boundary

lands claims of the Fort Mojave and Colorado River Indian Tribes. See 373 U.S. at 601. The Court essentially held that Master Rifkind had acted prematurely in resolving the underlying boundary disputes, which might be resolved in other fora. See *ibid.* By the same reasoning, Master Rifkind could not have resolved the analogous boundary dispute concerning the Fort Yuma Reservation, which was already the subject of litigation before the Indian Claims Commission. See pp. 5-6, *supra*.

The res judicata principles of merger and bar can preclude claims that were or could have been advanced in prior litigation between the parties. See, *e.g.*, *Rivet* v. *Regions Bank*, 522 U.S. 470, 476 (1998); *Richards* v. *Jefferson County*, 517 U.S. 793, 797 n.4 (1996); *Allen* v. *McCurry*, 449 U.S. 90, 94 (1980); *Cromwell* v. *County of Sac*, 94 U.S. 351, 352-353 (1876); Restatement (Second) Judgments §§ 17-19, 24 (1982). Those principles, however, do not preclude claims that could not have been decided in the prior proceedings. See, *e.g.*, *Lawlor* v. *National Screen Serv. Corp.*, 349 U.S. 322, 327-328 (1955); Restatement (Second) Judgments §§ 20, 26 (1982); Charles A. Wright et al., *Federal Practice and Procedure* § 4415, at 122 (1981) ("Preclusion is inappropriate * * * as to matters that could not be advanced in the first action."). For example, the Restatement points out:

> A valid and final personal judgment for the defendant, which rests on the prematurity of the action or on the plaintiff's failure to satisfy a precondition to suit, does not bar another action by the plaintiff instituted after the claim has matured, or the precondition has been satisfied, unless a second

> action is precluded by operation of the substantive law.

Restatement (Second) Judgments § 20(2) (1982). Compare *Arizona I*, 373 U.S. at 601 ("We hold that it is unnecessary to resolve [the boundary] disputes here. Should a dispute over title arise because of some future refusal by the Secretary to deliver water to [a disputed] area, the dispute can be settled at that time.").

Third, the Restatement likewise points out:

> When any of the following circumstances exist, the general rule of [Restatement] § 24 [against splitting claims] does not apply to extinguish the claim, and part or all of the claim subsists as a possible basis for a second action by the plaintiff against the defendant:
>
> (a) The parties have agreed in terms or in effect that the plaintiff may split his claim, or the defendant has acquiesced therein;
>
> (b) The court in the first action has expressly reserved the plaintiff's right to maintain the second action;
>
> * * * * *

Restatement (Second) Judgments § 26(1) (1982); see, *e.g.*, Charles A. Wright et al., *Federal Practice and Procedure* § 4413, at 106 (1981) ("A judgment that expressly leaves open the opportunity to bring a second action on specified parts of the claim or cause of action that was advanced in the first action should be effective to forestall preclusion."). That principle is directly applicable here, for the 1979 and 1984 Supplemental Decrees expressly provided for adjustment of water

rights upon final determination of reservation boundaries. See Article II(D)(5) of the 1984 Supplemental Decree, 466 U.S. at 145 (The water rights of all five of the Indian Tribes "shall be subject to appropriate adjustments by agreement or decree of this Court in the event that the boundaries of the respective reservations are finally determined."); Article II(D)(5) of the 1979 Supplemental Decree, 439 U.S. at 421 (accord). By contrast, no provision of the 1964 Decree or the 1979 and 1984 Supplemental Decrees expressly provided for adjustment of water rights based on "omitted lands."

Those general principles should inform the Court's decision here. This Court's decision in *Arizona I*, which expressly held that Master Rifkind erred in prematurely reaching disputed boundary issues respecting the Fort Mojave and Colorado River Indian Reservations, 373 U.S. at 601, leaves no doubt that Master Rifkind likewise could not have entertained the boundary lands claims respecting the Fort Yuma Reservation. The Court expressly deferred decision on those claims through Article II(D)(5) of its 1964 Decree, it retained jurisdiction over this case under Article IX, and it expressly left open the boundary lands issues for all five Reservations in the 1979 and 1984 Supplemental Decrees. As the Court noted in *Arizona II*, 460 U.S. at 624, it frequently retains jurisdiction precisely because of "the need for flexibility in light of changed conditions *and questions which could not be disposed of at the time of an initial decree*." (emphasis added). See also Tuttle Report 56-57 n.73 ("Article IX, even most narrowly construed, would recognize the propriety of entertaining claims as to the * * * Fort Yuma [Reservation].").

In short, the Court's decisions in *Arizona I* and *Arizona II*, as well as its 1979 and 1984 Supplemental

Decrees, make clear that the boundary lands claims for the Fort Yuma Reservation present open issues that are to be decided in an appropriate forum and at an appropriate time. This Court's decisions pose no bar to the Master's resolution of those issues on their merits in proceedings on remand.

C. The Preclusion Defense Has In Any Event Been Waived In, And Foreclosed By, Prior Proceedings In This Case

The State Parties admit that they did not raise their preclusion defense to the boundary lands claims for the Fort Yuma Reservation in this Court until July 19, 1989, when they initiated the current proceedings. See State Parties Except. Br. 16. Recognizing that they have raised a preclusion defense late in this litigation, the State Parties argue that they "did not waive their right" to present that defense and that they have not presented the defense in an "untimely" manner. State Parties Except. Br. 21-24, 24-26. We disagree.

This Court's Rules state that the Federal Rules of Civil Procedures "may be taken as guides" in the conduct of actions within the Court's original jurisdiction. Sup. Ct. R. 17.2. See *Nebraska* v. *Wyoming*, 507 U.S. 584, 590 (1993). The Federal Rules direct that "a party shall set forth affirmatively" in its pleadings affirmative defenses and expressly includes, among those defenses, "res judicata." Fed. R. Civ. P. 8(c); see also Fed. R. Civ. P. 12(b). See *Rivet*, 522 U.S. at 476 ("Claim preclusion (res judicata), as Rule 8(c) of the Federal Rules of Civil Procedure makes clear, is an affirmative defense."); *Blonder-Tongue Labs., Inc.* v. *University of Ill. Found.*, 402 U.S. 313, 350 (1971) ("*Res judicata* and collateral estoppel are affirmative defenses that must be pleaded."). If a party fails to plead res judicata, the courts deem the affirmative defense waived. See

Huffman v. *Pursue, Ltd.*, 420 U.S. 592, 607-608 n.19 (1975) ("appellants did not plead res judicata in the District Court, and it is therefore not available to them here").

The State Parties contend that they have not waived that affirmative defense because the 1979 and 1984 Supplemental Decrees do not expressly prevent the Court from considering it (State Parties Except. Br. 21-24). But, as the term affirmative defense implies, the fact that the Supplemental Decrees do not mention claim preclusion did not absolve the State Parties of their affirmative obligation to raise that defense in response to the United States' December 22, 1978, Motion for Modification of the Decree. The State Parties also contend that their defense is not untimely because, in their view, a court may raise a res judicata defense sua sponte at any time (State Parties Except. 24-26). While this Court has observed that "trial courts may in appropriate cases raise the res judicata bar on their own motion," *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 231 (1995), the fact remains that neither Master Tuttle nor the Court did so in the *Arizona II* proceedings. The State Parties' invocation of that defense in these proceedings comes far too late.

More fundamentally, not only did the State Parties fail to raise res judicata as an affirmative defense, but they stipulated to a Supplemental Decree in 1979 that expressly extended to all five Reservations the provisions of Article II(D)(5) of the 1964 Decree—which had theretofore expressly applied only to the Fort Mojave and Colorado River Indian Reservations—for appropriate adjustments in previously adjudicated water rights in the event that the boundaries of the five Reservations were thereafter "finally determined." Because the purpose of Article II(D)(5) of the 1964 Decree was

to provide for adjustments of water rights based on the inclusion of boundary lands in the Fort Mojave and Colorado River Indian Reservations *notwithstanding* the Court's decision in *Arizona I*, the express extension of that Article to all five Reservations in 1979—after the United States sought additional water rights for the boundary lands of the Fort Yuma Reservation—necessarily allows for such adjustments respecting the Fort Yuma Reservation, notwithstanding the Court's decision in *Arizona I*.

If the State Parties had thought otherwise, and believed that they had a valid preclusion defense to the boundary lands claims for the Fort Yuma Reservation even after entry of the 1979 Supplemental Decree, they certainly would have raised that defense in the proceedings before Master Tuttle. They did not do so. To the contrary, the State Parties consented to a determination of the boundary lands claims on the merits. See Tuttle Report 56-57. The State Parties' willingness to have the boundary lands claims determined on the merits stands in stark contrast to their approach to the Tribes' omitted lands claims. The State Parties vigorously asserted a preclusion defense to those claims in the proceedings before Master Tuttle. See Tuttle Report 29-55. The State Parties' decision to raise a preclusion defense to the omitted lands claims, but not to the boundary lands claims, suggests both that they made a strategic decision to forgo raising a preclusion defense in response to the latter claims and that they understood that such a defense was foreclosed by Article II(D)(5) of the 1979 Supplemental Decree.

If the Court concludes that the defense is not altogether foreclosed, however, the defense should be rejected on the merits. As we explain in Point B, *supra*, the boundary lands claims for the Fort Yuma

Reservation are not precluded by this Court's decisions in *Arizona I* and *Arizona II* because those claims were not decided, and could not have been decided, in the prior litigation. Instead, those claims were left open for future decision in accordance with the express terms of the 1979 and 1984 Supplemental Decrees.

D. The Master's Ultimate Recommendation That This Court's Decisions In *Arizona I* And *Arizona II* Do Not Preclude The Boundary Lands Claims Is Correct

The State Parties challenge the Master's reasoning that res judicata does not preclude the United States and the Quechan Tribe from asserting boundary lands claims because the Secretary's 1978 order recognizing that the lands in question are part of the Fort Yuma Reservation was a "later and unknown circumstance" that the United States could not have anticipated. State Parties Except. Br. 26-27. See McGarr Report App. 2(A) at 7. Although this Court customarily retains jurisdiction to modify its Decrees in response to changed circumstances, see, *e.g.*, *Nebraska*, 507 U.S. at 590-593; *Arizona II*, 460 U.S. at 624-625, the United States does not rely on that rationale in this case. Rather, we submit that the boundary lands claims are not precluded, under basic principles of res judicata, because that defense is foreclosed and because this Court's decisions in *Arizona I* and *Arizona II* establish that those claims were not decided, and could not have been decided, in the prior proceedings. See pp. 5-21, *supra*. The Master's ultimate recommendation is surely correct standing on those bases alone, and there is no occasion to explore the more difficult and fact-specific question of what types of "changed conditions" would justify the modification of this Court's water rights decrees. See *Nebraska*, 507 U.S. at 593.

E. The Boundary Lands Claims For The Fort Yuma Reservation Should Be Remanded For Further Proceedings

The Master properly rejected the State Parties' argument that this Court's prior decisions preclude the United States and the Quechan Tribe from asserting boundary lands claims for the Fort Yuma Reservation. The Master erred, however, for the reasons set forth in the Brief for the United States in Support of Exception, in holding that the 1983 consent judgment entered in the United States Claims Court precluded the United States and the Tribe from making those claims. See U.S. Except. Br. 14-41. The Court should therefore remand those issues to the Master for further proceedings. As we have said in our own Exception Brief (at 42-43), we are hopeful that, if the matter is returned to the Master, a proposed settlement can be reached. But if the parties are unable to negotiate a proposed settlement of those issues, the issues should be adjudicated on the merits. *Ibid.*

CONCLUSION

The exception of the State Parties to the Report of the Special Master should be overruled.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
LOIS J. SCHIFFER
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
JEFFREY P. MINEAR
Assistant to the Solicitor General
F. PATRICK BARRY
Attorney

FEBRUARY 2000